

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 15, 2013;
Ruling No. 2013-3651; Agency: Virginia Commonwealth University; Outcome:
Hearing Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of Virginia Commonwealth University
EDR Ruling No. 2014-3651
July 15, 2013

In a letter dated July 10, 2013, Virginia Commonwealth University (the agency) has requested a compliance ruling to challenge the hearing officer's pre-hearing order regarding the production of a document in Case No. 10129. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) finds the hearing officer has not abused his discretion by ordering the production of this document at hearing.

FACTS

The facts of the grievance at issue in Case No. 10129 are not pertinent to this ruling. In this case, the hearing officer ordered the agency to produce documents requested by the grievant. The agency objected to producing one of the documents, stating that if it did produce the requested document, then it would be disclosing a personnel record of another employee. As such, the agency states it cannot produce the requested document without obtaining written authorization from that employee. The hearing officer overruled the agency's objection and directed the agency to produce the document. The agency appeals the hearing officer's pre-hearing order on that issue and seeks EDR's review.

DISCUSSION

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party, in a timely fashion."¹ EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. Just cause is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."² For purposes of document production, examples of just cause include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.³ The statute further states that "[d]ocuments

¹ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* at § 9.

³ See, e.g., EDR Ruling No. 2008-1935, 2008-1936.

pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”⁴

In this case, the agency challenges the hearing officer’s pre-hearing order to produce “[e]vidence of any disciplinary action taken against [named employee] for his involvement in the incident, if any was taken.” The agency asserts that “records of disciplinary actions are personal information that may not be disclosed pursuant to Policy Number 6.05 – Personnel Records Disclosure.” Moreover, the agency disputes the relevance of the requested document to the grievant’s claims because it alleges the grievant and the named employee are not similarly situated. The grievant asserts that “[the named employee] was equally involved in the incident that resulted in [the grievant’s] termination and that discipline was not applied in a consistent manner by the agency.”

DHRM Policy 6.05 states that records of suspension or removal including disciplinary actions under the Standards of Conduct, DHRM Policy 1.60, “may not be disclosed to third parties without the written consent of the subject employee.”⁵ However, to the extent materials otherwise protected by a DHRM policy are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.⁶ Indeed, the Virginia Code specifically contemplates the exchange of documentation related to nonparties in a redacted format.⁷ Thus, the provisions of DHRM Policy 6.05 do not constitute just cause to deny access to the requested documents.

The agency further asserts the grievant and the named employee were not similarly situated, and as such, the requested document is not relevant. However, it would appear at first blush that this document may be relevant to the grievant’s mitigating claim that he was inconsistently disciplined by the agency. Mitigating evidence regarding whether the grievant’s discipline was consistent with the agency’s treatment of another similarly situated employee is relevant to a grievance. Further, by ordering production of the document, it appears the hearing officer has already determined that it is relevant to some degree. We find nothing in the information presented to EDR that suggests the hearing officer’s determination in this regard abused his discretion. It appears this document may be essential for a fair process to determine the merits of this grievance.

Any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of a third party.⁸ In the alternative, instead of producing the actual document in a redacted format, the agency may consider producing the relevant information contained in the disciplinary action in a memo or other document to protect the personnel record itself.

⁴ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

⁵ *See* DHRM Policy 6.05, *Personnel Records Disclosure*.

⁶ *See, e.g.*, EDR Ruling No. 2007-1402; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-683.

⁷ Va. Code § 2.2-3003(E).

⁸ *Id.*

EDR's rulings on matters of compliance are final and nonappealable.⁹



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⁹ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).